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INCREASING CITIZENS' RECOURSE TO ADR

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I. INEFFICIENCIES IN THE SYSTEM OF JUSTICE AND ADR

1. Despite the continuous efforts by the European Union (EU) and its Member States to remedy the shortcomings in their systems of justice,[1] the measures taken thus far have yet to achieve the desired results.[2] Thus, the inefficiency of courts, high cost of legal services, and complications in existing procedures continue to persist.[3] Evidently, the guarantee of access to justice, as enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[4] is suffering. EU citizens[5] have often attempted to surmount these shortcomings in both passive and active ways.

2. Passively, parties to a dispute often leave the dispute unresolved, as in certain cases, it seems more inexpensive and sounder to do so. In fact, the most recent studies found that 25 % of commercial disputes in the EU are left unresolved,[6] while 45 % of small businesses have indicated that they will not pursue a claim in a foreign court if the value of the claim was less than €50,000.[7] These figures are alarming for three reasons. Firstly, they indicate that the parties are waving their right of access to justice to avoid lengthy and expensive court proceedings. Secondly, they indicate a loss to the market and the deterioration of a business relationship.[8] Thirdly, the decision to leave a dispute unresolved can still entail certain costs for the parties, such as unpaid invoices, uncompensated damages, lawyers' fees, and filing expenses.[9]

3. Actively, the parties have looked to non-judicial (or alternative) means of dispute resolution. Resolving disputes using non-judicial mechanisms is not a new concept. There are countless societies whose culture supports the resolution of disputes between private parties via a third party.[10] For instance, mediation, one of the most common forms of alternative dispute resolution (ADR), has long been used by the Jews, Christians, Muslims, Hindus, Buddhist, and various ancient cultures to resolve disputes.[11] Today, commercial parties most commonly resort to the following ADR mechanisms: arbitration, mediation, conciliation, negotiation,

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1 EU COMMISSION, "The 2016 EU Justice Scoreboard", 2016, 3.

2 In 2011, Italy faced a backlog of five million cases (M.H. MARTUSCELLO, "The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration", *New York International Law Review* 2011, 49). Also see J. NOLAN-HALEY, "Is Europe Headed Down the Primrose Path with Mandatory Mediation?", *Fordham University School of Law* 2012, 982. Regarding issues relating to access to justice in Eastern and Central Europe see E.F.o.A.t. JUSTICE, "Access to Justice in Central and Eastern Europe: Forum Report" 2002.

3 See P. CORTÉS, *Online Dispute Resolution for Consumers in the European Union*, Oxon, Routledge, 2011, 9.

4 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

5 Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. C 115/47, at Article 20.

6 V. TILMAN, *Lessons Learnt From The Implementation Of The EU Mediation Directive: The Business Perspective* Note, 2011, 8; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, p. 492; C. ESPLUGUES, "General Report: New Developments in Civil and Commercial Mediation - Global Comparative Perspectives" in C. ESPLUGUES and L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 4.

7 N. ALEXANDER, "Harmonisation and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reform" in F. STEFFEK and K. HOPT (eds.), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford, Oxford University Press, 2013, 179.

8 V. TILMAN, *Lessons Learnt From The Implementation Of The EU Mediation Directive: The Business Perspective* Note, 2011, 8.

9 V. TILMAN, *Lessons Learnt From The Implementation Of The EU Mediation Directive: The Business Perspective* Note, 2011, 8.

10 See M.H. S.C., ONN, L.S. and TAT, C.T., "ADR in East Asia" in J.C. GOLDSMITH, A. INGEN-HOUSZ and G.H. POINTON (eds.), *ADR in business : practice and issues across countries and cultures*, Alphen aan den Rijn, Kluwer Law International, 2006.

11 C.W. MOORE, *The Mediation Process: Practical Strategies for Resolving Conflict*, San Francisco, Jossey-Bass (A Wiley Brand), 2014.

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ombudsmen procedures, and expert determination.[12] Moreover, according to numerous scholars, ADR institutions, and governments, the use of ADR to resolve disputes is on the rise.[13]

4. It should be noted that as there is no consensus regarding the definition of 'ADR', this article adheres to the EU Commission's definition, according to which, 'ADR' "includes only mechanisms involving a neutral third party."[14] Thus, while arbitration is included in this definition, negotiation is not.[15] Common ADR mechanisms in the EU included arbitration, mediation, conciliation, and ombudsman procedures.[16] However, it should be noted that this article excludes binding forms of ADR from its scope. Thus, when referring to ADR, it is focusing on non-binding ADR. That is mediation/conciliation, not arbitration. 'Mediation' is defined in Article 3(a) of the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[17] as "a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator." In other words, mediation involves a third-party neutral who attempts to aid the parties in coming to an amicable settlement.

5. The distinction between binding and non-binding ADR is necessary, as arbitration is an established form of dispute resolution that enjoys global popularity for the resolution of commercial disputes as a result of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), while non-binding forms of ADR are said to be experiencing a slow renaissance in the EU.[18] In addition, there are those that oppose the classification of arbitration as ADR due to its binding nature.[19] This argument is especially relevant in the context of escalation clauses where arbitration is the subsequent/ultimate step to non-binding forms of ADR. In excluding arbitration from the discussion of the rise of ADR, this paper reflects on the history of arbitration to assess whether ADR mechanism such as mediation will enjoy the same faith.

6. This article focuses on the active ways in which citizens have attempted to address the inefficiencies in the justice system and thereby contributed to the growth of regulation of ADR. In particular, this article explores the barriers that prevent parties from considering ADR as a legitimate and effective method of dispute resolution. The scope of research is limited to selected Member States, namely England, Germany, and the Netherlands. The choice of EU Member States is motivated by two interlinked reasons. Firstly, the Member

12 C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 491; L. MISTELIS and C. SCHMITTHOFF, "ADR in England and Wales: A Successful Case of Public Private Partnership" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 161; F. STEFFEK and H. UNBERATH, "Guide for Regulating Dispute Resolution (GRDR): Principles and Comments" in F. STEFFEK and H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 15.

13 Regarding the rise of ADR see S.C., M.H. *et al.*, "ADR in East Asia" in J.C. GOLDSMITH *et al.* (eds.), *ADR in business: practice and issues across countries and cultures*, Alphen aan den Rijn, Kluwer Law International, 2006, 147; A. DE ROO and R. JAGTENBERG, "The Netherlands Encouraging Mediation" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 237; A. FIADJOE, *Alternative Dispute Resolution: A Developing World Perspective*, Great Britain, Cavendish Publishing Limited, 2013, 1; M. FRIES, "Common Patterns of Consensual Conflict Resolution", *KritV* 2012, 122; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 492.

14 EU COMMISSION, "A step forward for EU consumers: Questions & answers on Alternative Dispute Resolution and Online Dispute Resolution" 2013, http://europa.eu/rapid/press-release_MEMO-13-193_en.htm.

15 M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, nr. 2, 273.

16 F. STEFFEK and H. UNBERATH, "Guide for Regulating Dispute Resolution (GRDR): Principles and Comments" in F. STEFFEK and H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 15.

17 *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3.

18 D. CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 64; C. ESPLUGUES and S. BARONA (eds.), *Global Perspectives on ADR*, Cambridge, Intersentia Publishing Ltd., 2014, vi.

19 C. JARROSSON, "Legal Issues Raised by ADR" in J.C. GOLDSMITH, A. INGEN-HOUSZ and G.H. POINTON (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*, The Netherlands, Kluwer Law International, 2006, 114; H. GENN, S. RIAHI and K. PLEMING, "Regulation of Dispute Resolution in England and Wales: A Sceptical Analysis of Government and Judicial Promotion of Private Mediation" in F. STEFFEK and H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 137; MISTELIS, L. and SCHMITTHOFF, C., "ADR in England and Wales: A Successful Case of Public Private Partnership" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 139.

States under analysis actively promote the use of ADR.[20] Secondly, the selected jurisdictions have an influential role in the development of ADR in the EU.[21]

7. In addressing the role of citizens in the rise of ADR, this article is divided into three sections. The first section assesses the current status of ADR in the Member States under analysis. It further claims that ADR in the EU does not enjoy the same degree of use as in common law jurisdictions such as Australia and Canada. On the basis of this argument, the first section establishes two factors that may have prevented the spread of ADR in the EU. The second section builds on the first by taking into consideration the abovementioned factors to provide the EU with suggestions regarding a future approach to ADR. Such suggestions are based upon a comparative analysis of the various approaches to the spread of ADR. The final section concludes this article by assessing which approach is most likely to be proven effective in practice.

II. THE "RISE" OF ADR IN THE EU

8. The use of ADR in the resolution of commercial disputes in the EU has seen a rise in popularity since the 1990s.[22] Currently, ADR mechanisms such as mediation are growingly accepted in many places.[23] Furthermore, the number of disputes settled via ADR increases annually albeit insignificantly in comparison to the number of cases litigated or arbitrated. According to Cairns and Alexander, amongst others, the slow increase is perhaps because of the limited familiarity of civil law jurisdictions with ADR, as many Member States, such as Germany, France, and Austria, have a culture for litigation.[24] Even in Member States where mediation is an accepted form of dispute resolution, the resort to such a mechanism is still negligible compared to the number of court cases. For instance, in the Netherlands, a proponent of mediation, a 2011 study found that there were only 51,690 mediations compared to 1,187,560 civil court cases.[25]

9. Moreover, despite the unrefuted benefits of mediation,[26] only 0.5 % of cross border commercial disputes in the EU go to mediation.[27] Nevertheless, researchers continue to proclaim that ADR is on the

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20 EU COMMISSION, "The 2016 EU Justice Scoreboard" 2016.

21 England belongs to the category of common law systems, where there is a more rapid spread of ADR and thus more cases dealing with the issue of enforceability. Germany, as the biggest Member State, is one of the most influential States in setting legislative trends in the EU. Lastly, the Netherlands, an active proponent of ADR, was one of the first Member States to shift its focus on ADR.

22 See C. ESPLUGUES, J.L. IGLESIAS and G. PALAO (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013; E. SILVESTRY, "Alternative Dispute Resolution in the European Union: an Overview", *Russian Law* 2013; A. DE ROO and R. JAGTENBERG, "The Netherlands Encouraging Mediation " in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 237; M.H. MARTUSCELLO, "The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration", *New York International Law Review* 2011, 51.

23 See, for example, Member States implementation of *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3; *Directive 2013/11/EU Of The European Parliament And Of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)* [2013] OJ L 165/63. See also *Regulation (EU) No 524/2013 Of The European Parliament And Of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)* [2013] OJ L 165/1.

24 The slower spread of mediation in the civil law jurisdictions of continental Europe is in part due to the litigation culture present in the German legal culture (D.CAIRNS, "Mediating International Commercial Disputes: Differences in U.S. and European Approaches", *Dispute Resolution Journal* 2005, 67.) For a general overview, also see C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 527; M. FRIES, "Common Patterns of Consensual Conflict Resolution", *KritV* 2012, 122; ESPLUGUES, C. (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 492; H.D.B.d. PINHO and M.P. PAUMGARTTEN, "The Integration of Mediation Within Justice System: An Assessment from the Brazilian and European Legal Frameworks" 2015, 3. Also see, N. ALEXANDER (ed.), *Global Trends in Mediation*, New York, Kluwer Law International, 2006.

25 A. VAN HOEK and J. KOCKEN, "The Netherlands 2013" in C. ESPLUGUES, J.L. IGLESIAS and G. PALAO (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Intersentia Publishing Ltd., 2013, 494; P. ALBERS, "The Netherlands" in G. DE PALO and M.B. TREVOR (eds.), *EU MediationLaw and Practice*, Oxford, Oxford University Press, 2012, 369.

26 Cost and time savings, speed, flexibility, confidentiality, preserving of the relationship, and a wide range of potential options (A. ODDY and O'NEILL, J., "An Introduction To Mediation - What It Is And How It Works", *Herbert Smith Freehills* 2016.)

27 N. ALEXANDER, "Nudging Users Towards Cross-Border Mediation: Is It Really About Harmonised Enforcement Regulation?", *Contemporary Asia Arbitration Journal* 2014, afl. 2, 408; G. DE PALO, L. D'URSO, M.B. TREVOR, B. BRANON, R.

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rise.[28] They base this observation on the number of registered mediators,[29] the growing number of cases mediated annually,[30] government interest in the promotion and regulation of ADR, and the recognition of the importance of ADR among business leaders.[31] Therefore, it is not incorrect to claim that ADR is on the rise; however, its rise in the EU does not seem to be as rapid as in common law jurisdictions such as Australia and Singapore where resort to ADR is common practice for commercial parties.

10. This slow rise is surprising in light of the efforts of the EU and its Member States to actively promote and support the settlement of disputes outside the courts by informing businesses and consumers of the benefits of ADR as a flexible, quick, cheap, and informal alternative to litigation.[32] The EU has gone as far as attempting to provide a framework for ADR by addressing the concerns of consumer organizations and governmental agencies through enacting legislation in the field of consumer ADR.[33]

11. The weak response to the efforts at the EU and Member States level to promote ADR can be attributable to the fact that the general population is only waking up to the benefits of ADR. Such a problem is apparent in England, where ADR is an acceptable and often preferred alternative to judicial settlement and arbitration by leading businesses[34] and yet, mediation, the most prominent form of ADR, is "virtually unknown" to the common person and is often confused with arbitration.[35] This is partly the result of solicitors' and judges' failure to properly inform the parties of the usefulness of ADR.[36] Consequently, too many cases that could be settled continue to clog the court system.[37]

12. Moreover, in the Netherlands, a leading nation in the field of mediation,[38] the rise of ADR is not attributable to the general population. Instead, it is the result of the private initiatives of 1992, when a group of legal professionals collectively discussed the prospect of mediation in the Netherlands.[39] Lastly, the involvement of citizens is almost non-existent in Germany, the biggest Member States, where recourse to court

CANESSA, B. CAWYER and R. FLORENCE, "'Rebooting' The Mediation Directive: Assessing The Limited Impact of Its Implementation And Proposing Measures To Increase The Number of Mediations In The EU", *European Parliament* 2014.

28 Regarding the rise of ADR see S.C., M.H. *et al.*, "ADR in East Asia" in J.C. GOLDSMITH *et al.* (eds.), *ADR in business: practice and issues across countries and cultures*, Alphen aan den Rijn, Kluwer Law International, 2006, 147; A. DE ROO and R. JAGTENBERG, "The Netherlands Encouraging Mediation" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 237; A. FIADJOE, *Alternative Dispute Resolution: A Developing World Perspective*, Great Britain, Cavendish Publishing Limited, 2013, 1; M. FRIES, "Common Patterns of Consensual Conflict Resolution", *KritV* 2012, 122; C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 492.

29 P. ALBERS, "The Netherlands" in G. DE PALO and M.B. TREVOR (eds.), *EU MediationLaw and Practice*, Oxford, Oxford University Press, 2012, 367.

30 For instance, the mediation market grew by 5 % in the United Kingdom since 2014 (X, "Mediation Market Grows By 5 %: The 2016 Mediation Audit", *CEDR News*, 2016.).

31 M.S. MARTIN, "Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce", *Boston University International Law* 2002, 150.

32 L.F. KNUDSEN and S. BALIAN, "Alternative Dispute Resolution Systems Across the European Union, Iceland and Norway", *Procedia - Social and Behavioral Science* 2014, 945.

33 M.S. MARTIN, "Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce", *Boston University International Law* 2002, 150. Also see, *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3; *Directive 2013/11/EU Of The European Parliament And Of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on Consumer ADR)* [2013] OJ L 165/63; *Regulation (EU) No 524/2013 Of The European Parliament And Of The Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on Consumer ODR)* [2013] OJ L 165/1.

34 L. MISTELIS and C. SCHMITTHOFF, "ADR in England and Wales: A Successful Case of Public Private Partnership" in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 140.

35 A. HILDEBRAND, "The United Kingdom " in G. DE PALO and M.B. TREVOR (eds.), *EU Mediation Law and Practice* Oxford, Oxford University Press, 2012, 374.

36 H A. HILDEBRAND, "The United Kingdom " in G. DE PALO and M.B. TREVOR (eds.), *EU Mediation Law and Practice* Oxford, Oxford University Press, 2012, 375.

37 A. HILDEBRAND, "The United Kingdom " in G. DE PALO and M.B. TREVOR (eds.), *EU Mediation Law and Practice* Oxford, Oxford University Press, 2012, 375.

38 A. VAN HOEK and J. KOCKEN, "The Netherlands 2013" in C. ESPLUGUES *et al.* (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge, Intersentia Publishing Ltd., 2013, 494.

39 A. DE ROO and R. JAGTENBERG, "The Netherlands Encouraging Mediation " in N. ALEXANDER (ed.), *Global Trends in Mediation*, Germany, Centrale Für Mediation, 2003, 238.

is a deeply rooted tradition in legal culture, as Germany has a strong court system.[40] The above findings are alarming for two reasons. Firstly, they indicate a weak response from EU citizens to the efforts made to promote ADR, which is problematic for the growth of ADR within the EU.[41] Secondly, a lack of recourse to ADR suggests that parties that opt to leave their disputes unresolved due to inefficiencies in court proceedings or the complexity of cross-border dispute resolution do not benefit from ADR. The lack of effective and efficient methods of dispute resolution not only prevents parties from pursuing their claims, but also dissuades them from engaging in cross-border trade that might result in complex legal issues. There are two factors that may explain parties' reluctance to resort to ADR.

13. First, it seems that the rise of ADR in commercial disputes in the EU is the result of business leaders' desire for better alternatives to litigation,[42] legal scholars' and experts' support of ADR as a true alternative to court proceedings and arbitration, and the EU's concern regarding the protection of its citizens' right of access to justice. Therefore, only those from the elite categories of business leaders and legal experts have influenced the approach to ADR, meaning that consumers and small business in the EU have not been consulted in determining the strategy to promote ADR. This is despite their interests being mentioned as the main reasons for the promotion of ADR and the legislation thereof by the EU and its Member States. This is not to imply that the efforts of the EU to promote ADR have been in vain. In Germany, a country with a culture for litigation, a 2010 survey found that a large majority of the German population is now aware of mediation as a method of dispute resolution.[43] Though, it is questionable whether this growing awareness of ADR will result in the use of ADR in commercial disputes in the short term.

14. Second, there is a lack of a comprehensive framework for ADR in the EU,[44] which leads to differing approaches to essential legal issues. This diversity prevents commercial parties from opting for ADR to resolve their disputes, as there is no clear answer to the issues of validity and enforceability of both the ADR agreement and the settlement arising thereof. Hence, the lack of clarity of ADR combined with the high costs and length of court proceedings especially in cross-border disputes[45] prevents parties from engaging in cross-border commercial transactions. This has an indirect adverse effect on the internal market and a direct effect on the principle of access to justice as enshrined in Article 6 of the ECHR.[46]

15. In focusing on the spread of ADR, lessons can be learned from the global efforts made to promote the use of arbitration. Arbitration is a dispute resolution mechanism that enjoys familiarity and use globally.[47] Not only is its use established practice in international commercial disputes, but it also extends to investor-State disputes.[48] Undeniably, arbitration's growth resulted from the entry into force of the New York Convention in 1959.[49] Its enactment was the result of the initiative of the International Chamber of Commerce (ICC) to re-

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40 B. HESS and N. PELZER, "Regulation of Dispute Resolution in Germany: Cautious Steps towards the Construction of an ADR System" in F. STEFFEK and H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 212; B. HESS and N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES and L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 291.

41 C. ESPLUGUES (ed.), *Civil and Commercial Mediation in Europe: Cross-Border Mediation*, 2 dln., 2, Cambridge, Intersentia, 2014, 491.

42 M.S. MARTIN, "Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce", *Boston University International Law* 2002, 131; J. BARRET and J. BARRETT, *A History of Alternative Dispute Resolution: The Story of a Political, Social and Cultural Movement*, San Francisco Jossey-Bass, 2004, 69.

43 B. HESS and N. PELZER, "Mediation in Germany: Finding the Right Balance between Regulation and Self-Regulation" in C. ESPLUGUES and L. MARQUIS (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, New York, Springer, 2015, 292.

44 M. PIERS, "Europe's Role in Alternative Dispute Resolution: Off to a Good Start?", *Journal of Dispute Resolution* 2014, afl. 2, 278.

45 *Green Paper On Alternative Dispute Resolution In Civil And Commercial Law*, 'ADR is a political priority, repeatedly declared by the European Union institutions' (19 April 2002, COM (2002) 196 final).

46 Ibid.

47 G.B. BORN and R. KENT, "Rules of the game", *Legal Business Arbitration Report* 2006, 4; J.C. BETANCOURT and J.A. COOK, "ADR, Arbitration, and Mediation: A Collection of Essays: An Overview", *International Journal of Arbitration, Mediation and Dispute Management (Sweet & Maxwell)* 2014, xxii; P. SANDERS, "The History of the New York Convention", *United Nations Publication* 1999.

48 See EU COMMISSION, "Investor-to-State Dispute Settlement (ISDS): Some facts and figures" 2015, 9.

49 Today, 156 countries apply the New York Convention (P. SANDERS, "The History of the New York Convention", *United Nations Publication* 1999.)

trong court system.[40] The above findings are from EU citizens to the efforts made to pro- he EU.[41] Secondly, a lack of recourse to ADR due to inefficiencies in court proceedings or from ADR. The lack of effective and efficient ırsuing their claims, but also dissuades them x legal issues. There are two factors that may

tes in the EU is the result of business leaders' :perts' support of ADR as a true alternative to ıg the protection of its citizens' right of access ıess leaders and legal experts have influenced ss in the EU have not been consulted in deter- ests being mentioned as the main reasons for l its Member States. This is not to imply that nany, a country with a culture for litigation, a on is now aware of mediation as a method of wing awareness of ADR will result in the use

for ADR in the EU,[44] which leads to differing mmercial parties from opting for ADR to re- ' validity and enforceability of both the ADR . of clarity of ADR combined with the high : disputes[45] prevents parties from engaging in erse effect on the internal market and a direct e 6 of the ECHR.[46]

d from the global efforts made to promote the that enjoys familiarity and use globally.[47] Not disputes, but it also extends to investor-State ıtry into force of the New York Convention in national Chamber of Commerce (ICC) to re-

Germany: Cautious Steps towards the Construction of *Dispute Resolution: ADR and Access to Justice at the* ER, "Mediation in Germany: Finding the Right Balance UIS (eds.), *New Developments in Civil and Commercial* 1.
pe: Cross-Border Mediation, 2 dln., 2, Cambridge, In-

Need for Online Alternative Dispute Resolution in In- *tional Law* 2002, 131; J. BARRET and J. BARRETT, *A l Cultural Movement*, San Francisco Jossey-Bass, 2004,

ight Balance between Regulation and Self-Regulation" *l Commercial Mediation: Global Comparative Perspec-*

to a Good Start?", *Journal of Dispute Resolution* 2014,

mmercial Law, 'ADR is a political priority, repeatedly 96 final).

bitration Report 2006, 4; J.C. BETANCOURT and J.A. rview", *International Journal of Arbitration, Mediation* e History of the New York Convention", *United Nations*

SDS): Some facts and figures" 2015, 9.
RS, "The History of the New York Convention", *United*

place the Geneva treaties.[50] The ICC was founded by a group of industrialists, financiers, and traders.[51] Thus, the New York Convention was promoted by the needs of the elite, which suggests that the lack of resort to ADR by commercial parties is perhaps heavily interlinked to the lack of a comprehensive framework.

III. STRATEGIES TO INCREASE RESORT TO ADR

16. Drawing from the above, this section makes three suggestions that can be relied upon by the EU in its pursuit of spreading the use of ADR.[52] It should be noted that the suggestions should not be treated as alternatives as they are complementary to one another. Furthermore, such suggestions are not exhaustive; thus, their implementation can be accompanied by additional measures.[53] The suggestions are structured to reflect the order of the above analyzed factors.

A. Non-legislative measures

17. As the first factor indicated, the participation of citizens has been limited to that of business leaders and legal scholars, which perhaps explains the general populations' reluctance to resort to ADR to solve their commercial disputes. This is problematic, as it implies a disconnect between the discussion of ADR at the policy-making level and its use. Hence, as a first suggestion, the EU can, in line with the findings of a 2014 study from the European Parliament,[54] opt for non-legislative measures to increase the awareness of ADR, whether it be through education or pilot projects to promote the use and knowledge of ADR.[55] However, on its own, this suggestion will not result in a significant increase of ADR in the short to medium term. Instead, the above suggestion should be seen as a complementary action to legislative initiatives as outlined in the subsequent suggestions. This is because even if the general population is aware of the benefits of ADR, the lack of certainty regarding how such agreements are to be concluded and enforced and the litigation culture will prevent them from recourse to such mechanisms.

B. A comprehensive framework for ADR

18. Reflecting on the second factor and the findings of UNCITRAL Workings Group II's that an instrument regulating legal issues pertaining to ADR should be modeled on the New York Convention,[56] it is hereby suggested that the EU should consider the introduction of a *comprehensive* framework for ADR. Such a framework should address the main legal issue associated with ADR, namely enforceability of both the agreement to resort to ADR and the settlement agreement. This suggestion is strengthened by the fact that six years followings its implementation, the Mediation Directive –which aimed to provide a framework for mediation in order to increase the number of mediations- has not resulted in a significant increase in the use of mediation.[57]

50 X, *History 1923-1958*, www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958.
51 I.C.o. COMMERCE, "The Merchants of Peace" www.iccwbo.org/about-icc/history/.
52 See in general G. DE PALO and L. CONSTABILE, "Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Sourthern Mediterranean Countries", *Cardozo Journal of Conflict Resolution* 2006.
53 See, for example, the suggestions in G. DE PALO *et al.*, "'Rebooting' The Mediation Directive: Assessing The Limited Impact of Its Implementation And Proposing Measures To Increase The Number of Mediations In The EU", *European Parliament* 2014.
54 G. DE PALO *et al.*, "'Rebooting' The Mediation Directive: Assessing The Limited Impact of Its Implementation And Proposing Measures To Increase The Number of Mediations In The EU", *European Parliament* 2014.
55 G. DE PALO *et al.*, "'Rebooting' The Mediation Directive: Assessing The Limited Impact of Its Implementation And Proposing Measures To Increase The Number of Mediations In The EU", *European Parliament* 2014, 152-159.
56 UNCITRAL, A/CN.9/WG.II/WP.198 - Settlement of commercial disputes: preparation of an instrument on enforcement of international commercial settlement agreements resulting from conciliation.
57 "Despites its proven and multiple benefits, mediation in civil and commercial matters is still used in less than 1 % of the cases in the EU" (*GREEN PAPER On Alternative Dispute Resolution In Civil And Commercial Law*, 'ADR is a political priority, repeatedly declared by the European Union institutions' (19 April 2002, COM (2002) 196 final)).

19. The above is the result of several gaps in the Mediation Directive. Firstly, as the Directive only aims to provide a minimum common framework,[58] it does not address certain aspects of mediation.[59] Thus, despite the implementation of the Mediation Directive, differences in certain aspects of mediation continue to exist.[60] For instance, the Mediation Directive does not address the triggers that lead to mediation such as the agreement to mediate and court-ordered mediation. It simply provides that the courts may invite the parties to commence mediation.[61] In addition, the Directive contains a weak provision on the enforcement of settlement agreements, as it requires that the courts make a settlement agreement enforceable only if both parties have consented to the enforcement.[62] To require both parties to consent to the enforcement of their agreement is a requirement that is surprising, as parties often resort to enforcement only when a party to the agreement fails to fulfil its obligations.[63] Therefore, the Mediation Directive does not address essential issues in mediation. A framework for ADR should be established on the basis of the structure of the New York Convention, as this structure has been successful in promoting arbitration as an effective alternative to court proceedings.

20. The scope of the New York Convention is limited to foreign and non-domestic arbitral awards.[64] The Convention addresses both the recognition of arbitral agreements and the recognition and enforcement of arbitral awards. Article II (1) of the New York Convention requires contracting States to recognize a written agreement to arbitrate.[65] Moreover, in recognizing an agreement to arbitrate, Article II (3) of the New York Convention obliges contracting Sates to enforce the arbitral agreement unless the agreement is null and void, inoperative, or incapable of being performed.[66] Articles III to VI of the New York Convention address the enforceability of the arbitral award. The main obligation of the contracting States is to recognize and enforce arbitral awards according to the procedural mechanism of the enforcing State.[67] The enforcement of an arbitration award can only be refused on five grounds: "incapacity of the parties, invalidity of the arbitration agreement, due process, scope of the arbitration agreement, jurisdiction of the arbitral tribunal, setting aside or suspension of an award in the country in which, or under the law of which, that award was made."[68] Furthermore, the enforcing authority can refuse enforcement on its own motion if the subject matter of the award is not arbitral or if the award conflicts with public policy.[69]

21. In line with the New York Convention, a framework for ADR should primarily focus on the unification or complete harmonization of the domestic approaches to the enforceability of both the ADR clause

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58 C. ESPLUGUES, "Access to Justice or Access to States Courts' Justice in Europe? The Directive 2008/52/EC on Civil and Commercial Mediation", *Revista de Processo* 2013, 9.

59 Issues covered include the quality of the mediation (Article 5), recourse to mediation (Article 5), enforceability of agreement resulting from mediation (Article 6), and confidentiality (Article 7), limitation periods (Article 8). Also see *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3.

60 C. ESPLUGUES *et al.* (eds.), *Civil and Commercial Mediation in Europe: National Mediation Rules and Procedures*, 2 dln., 1, Cambridge Intersentia Publishing Ltd., 2013, vi.

61 Article 5 *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3.

62 Article 6(1) *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3.

63 C.T.K. DESMOND, "The SIAC-SIMC Arb-Med-Arb Protocol: Enforcing International Commercial Mediated Settlement Agreements (MSAs) through the New York Convention" in J. LEE and M. LIM (eds.), *Contemporary Issues in Mediation*, I, London, World Scientific Publishing Co. Pte. Ltd, 2016, 85; M. ROBERTSON, "Compliance Success with Mediated Settlements in Small Claims", *Mediate.com* 2015, www.mediate.com/articles/RobertsonM1.cfm.

64 "1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought" (New York Convention, Article I (1)).

65 "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration" (New York Convention, Article II (1)).

66 "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed" (New York Convention, Article II (3)).

67 "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards" (New York Convention, Article III).

68 U. NATIONS, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" 2015, 2

69 U. NATIONS, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" 2015, 2

and the settlement agreement in order to provide the parties with legal certainty. Moreover, such a framework must set out a clear and exhaustive list of defences that can be used to object enforcement. In prescribing enforcement, it would be advisable to address the question of what obligations the parties must perform in order to comply with their ADR agreement. Such an instrument can also address the issue of prescription and limitation periods. Additional legal issues associated with ADR such as confidentiality[70] and the quality of the mediation[71] can be directly dealt with by the commercial parties in their agreement to pursue ADR through the inclusion of a confidentiality clause and the selection of experienced third party neutrals.[72] This is not to say that confidentiality and quality issues should be excluded from the scope of a future framework.

22. The unification or complete harmonization of the approach to the enforceability issue will provide parties with the legal certainty they currently lack. In light of the need to reduce the differences in the domestic approaches to the main legal issue of ADR, enforceability, a future Directive on ADR should not solely harmonize on the basis of a minimum common denominator. This is because such an approach is not appropriate in the context of commercial ADR. Instead, the content of a framework on ADR should be based on best practices[73] amongst States where ADR is common practice. Moreover, regardless of the direction taken, the EU's pursuit to spread ADR should reflect the work of other institutions, such as that of UNCITRAL, in order to remain connected with the approach towards ADR at the international level.[74]

C. Mandatory ADR

23. The second suggestion proposed that there would be increasing resort to ADR if the framework for ADR addressed legal issues pertaining to the validity and enforceability of ADR. Such a framework, however, does not guarantee an increase in the use of ADR, as, ultimately, the choice to resort to ADR is voluntary in many jurisdictions.[75] Thus, as suggested by numerous experts and scholars,[76] the introduction of a mandatory ADR scheme for commercial disputes is perhaps the most certain method to ensure increasing awareness and use of ADR.[77] The use of mandatory mediation is apparent in both civil and common law jurisdictions. The suggestion to introduce court ordered mediation in the EU is rather controversial, as many seem perplexed by the concept of forcing parties into such mechanisms in light of the voluntary nature of ADR.[78] Nevertheless, to force parties to attend ADR does not mean that parties are forced to settle their dispute.[79] The legality of

70 *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3, Article 7.

71 *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3, Article 4.

72 It should be noted that such issues require more attention in family, employment, or consumer disputes, where the parties are at times on unequal footing.

73 The approaches that result in high party satisfaction and that facilitate the enforcement of agreements.

74 "In Europe, for example, a Eurocentric approach should be avoided in order to keep a connection with the world outside" (M. GEBAUER, "Unification and Harmonization of Laws", *Oxford Public International Law* 2009, 7.)

75 This is especially evident when one looks at figures regarding a voluntary mediation scheme in England's Central London Country Court system: only 160 out of the 4,500 cases (0.3 %) that were offered mediation opted for mediation (L.C.s. DEPARTMENT, "Alternative Dispute Resolution: A Discussion Paper" 1999., Annex B). Furthermore for Austria see Section 1 *Zivilrechts-Mediations-Gesetz* [Austrian Mediation Act] (ZMG) defines Mediation as 'an activity voluntarily entered into by the parties.' See also *Regierunsvorlagezum ZivMediatG* [Mediation Bill Notes] 2003, 200124 d.B. (XXII GP), s.1, 19; *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3; C. LEON and I. ROHRACHER, "Austria" in G. DE PALO and M.B. TREVOR (eds.), *EU Mediation Law and Practice*, Oxford, Oxford University Press, 2012, 14; P.G. MAYR and N. KRISTIN, "Regulation of Dispute Resolution in Austria: A Traditional Litigation Culture Slowly Embraces ADR" in F. STEFFEK and H. UNBERATH (eds.), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads*, Oxford, Hart Publishing Ltd., 2013, 79.

76 There are mandatory court-annexed mediation schemes throughout the globe (e.g. in the US, Canada, and Italy) (E. SUTER, "The Progress from Void to Valid for Agreements to Mediate", *Arbitration* 2009, 28).

77 In England, the introduction of the new Civil Procedure Rules empowered courts to encourage parties to mediation through the use of cost sanctions, which resulted in a 141 % increase in the number of commercial disputes mediated by CEDR (L.C. DEPARTMENT, "Emerging Findings: An Early Evaluation of Civil Justice Reforms" 2001, http://webarchive.nationalarchives.gov.uk/+www.dca.gov.uk/civil/emerge/emerge.htm).

78 D. QUEK, "Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program", *Cardozo Journal of Conflict Resolution* 2010, 485-486; C. GREEN, "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process", *ADR Bulletin* 2010, afl. 3, 2.

79 S.G. BULLOCKK and L.R. GALLAGHER, "Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana", *Louisiana Law Review* 1997, 948; C.C. HUTCHINSON, "The Case for Mandatory Mediation", *Loyola Law Review* 1996, 91.

mandatory mediation was confirmed by the ECJ in the *Alassini* case,[80] where it ruled that mandatory mediation as a precondition to litigation does not violate the principle of equivalence and effectiveness nor the principle of effective juridical protection.

24. The strictest compulsory mediation is one where the parties are automatically required to resort to mediation as a precondition to court proceedings.[81] In implementing such a scheme, flexibility should be maintained to allow the parties in special circumstances,[82] such as in cases requiring emergency measures, to access court without mediation. Other (semi) compulsory mediation schemes include court-referred mediation schemes and schemes that rely on adverse cost orders. The referral scheme provides judges with the discretionary power to determine which cases are suitable for a referral to mediation.[83] Such schemes are widely used in the United States, Canada, and Australia, while they are less popular in the EU. The cost order scheme involves the ordering of adverse costs on the party that unreasonably refused to consider and participate in mediation.[84] Such a scheme was implemented in the United Kingdom in 2011.[85] These schemes, however, do not guarantee an increase in mediation, as European judges who might view ADR with mistrust will not use their discretionary power to mandate mediation or adverse cost orders.

25. It is argued by the proponents of mandatory mediation, that to effectively introduce mediation as a true alternative to court proceedings, the EU should amend Article 5 of the Mediation Directive to require its Member States to introduce compulsory mediation schemes that require parties to attempt mediation as a precondition to court proceedings. Although mandatory mediation schemes have proven effective in some instances, such as in Italy in 2011, where the success rate of the mediations where the respondent attended the sessions neared half,[86] the introduction of such a pre-condition to litigation can be problematic. Firstly, mandatory mediation will only be effective long term if the quality of mediation is ensured. This is something that is difficult to monitor as long as the accreditation of mediators is left unchecked. Secondly, mandatory mediation runs the risk of becoming mere procedural step that the parties will partake in before going to court. This risk, however, can be mitigate if courts order cost on parties who are uncooperative or do not personally attend the mediation sessions.

IV. CONCLUSION

26. Alternative methods of dispute resolution are a topic on the legislative agendas of many States, as they actively work to promote their use in order to counteract the current difficulties faced by citizens in accessing the right to justice. The resort to ADR is not a new phenomenon and yet its use by commercial parties in the EU is minimal. This is especially shocking in light of the findings that 25 % of commercial disputes within the EU are left unresolved while 45 % of small business have indicated that they will not pursue a claim in a foreign court if the claim is less than € 50,000. Evidently, there is a clear gap between the aim of the legislator and the perception of citizens towards ADR. In presenting potential factors that could have contributed to this gap, this paper focused on the lack of a comprehensive framework for ADR and the unfamiliarity of many with ADR. In coming to this conclusion, three suggestions were made that the EU could rely upon in its efforts to promote the use of ADR in commercial disputes.

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80 Joined Cases C-317/108 & C-320/08, Alassini v. Telecom Italia Spa, 2010 E.C.R. 134. Also see *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters* [2008] OJ L 136/3, Article 3.

81 For instance in Italy, see Legislative Decree on Mediation Aimed at Conciliation of Civil and Commercial Disputes (28/2010). G. DE BERTI, "New Procedures for Mandatory Mediation" 2011, www.internationallawoffice.com/Newsletters/Arbitration-ADR/Italy/De-Berti-Jacchia-Franchini-Forlani-Studio-Legale/New-procedures-for-mandatory-mediation.

82 Such as those in need of an urgent order or those that have previously attempted private mediation.

83 See, e.g., Civil Procedure Act 2005 (NSW) pt 4; Supreme Court (General Civil Procedure) Rules 2005 (Vic) r 50.07; Uniform Civil Procedure Rules 1999 (Qld) r 319. For the UK, see, H. GENN, P. FENN, M. MASON, A. LANE, N. BECHAL, L. GRAY and D. VENCAPPA,"Twisting arms: court referred and court linked mediation under judicial pressure ", *Ministry of Justice Research Series* 2007; M. HANKS, "Perspectives On Mandatory Mediation", *UNSW Law Journal* 2012, afl. 3, 931.

84 See Civil Dispute Resolution Act 2011 (Cth) s 2; Civil Procedure Act 2005 (NSW) pt 2A. Also see M. HANKS, "Perspectives On Mandatory Mediation", *UNSW Law Journal* 2012, afl. 3, 931.

85 See Civil Dispute Resolution Act 2011 (Cth) s 2.

86 G. DE PALAO, "Mandatory Mediation Is Back In Italy With New Parliamentary Rules", *Mondo ADR* 2013, www.mondoadr.it/articoli/mandatory-mediation-italy-parliamentary-rules.html.

27. The suggestions were discussed in accordance with the perceived level of their effectiveness in promoting ADR. The implementation of the first suggestion would result in the familiarization of legal professionals and parties with the workings of ADR. However, such familiarization would be meaningless without an effective European framework for ADR. Therefore, as a second suggestion, this paper discussed the need for a comprehensive framework that addresses the enforceability issues that prevent parties from utilizing ADR in the resolution of their commercial disputes. In discussing the potential ways to encourage parties to resort to ADR, this paper acknowledged that the only guaranteed path to an increase in ADR in commercial disputes would involve mandatory ADR. Perhaps such a conclusion would not have been reached if the study focused on ways to increase the resort to ADR in countries with a culture for out of court settlement. In Member States with a culture for litigation, a compulsory mediation scheme is the only way to truly guarantee a short-term increase in the use of mediation. Regardless, if the choice if made to implement a mandatory mediation scheme, attention must be paid to ensure quality and satisfaction with the process.